

NO. 82-6611

IN THE SUPREME COURT OF THE UNITED STATES

October Term

DALE ROBERT YATES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

JOHN I. MAULDIN
STEPHEN J. HENRY
Attorneys at Law
710 East McBee Avenue
Greenville, South Carolina 29601

ATTORNEYS FOR PETITIONER.

QUESTIONS PRESENTED

I.

Should the Court grant the Writ to determine whether, in this capital case, the trial court erred by refusing to make available to the Petitioner an out of Court statement by State's witness Willie Wood following a pretrial discovery motion under Brady v. Maryland or following Petitioner's trial motion for discovery of Mr. Wood's statement prior to cross-examination thereby denying Petitioner's fundamental rights guaranteed by the due process clause of the Fourteenth Amendment?

II.

Should the Court grant the Writ to determine whether in this capital case, the trial court erred in refusing to charge the State's request to charge, concurred in by the Petitioner, which set forth a theory of felony murder?

III.

Should the Court grant the Writ to determine whether, in this capital case, the trial court erred in refusing to charge the sentencing jury specifically and in writing "that Dale Robert Yates did not kill the victim, Helen Wood?"

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
CITATION TO OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW.....	7
REASONS FOR GRANTING THE WRIT.....	9

I. The Court should grant the Writ to determine whether, in this capital case, the trial court erred by refusing to make available to the Petitioner an out of Court statement by State's witness Willie Wood following a pretrial discovery motion under Brady v. Maryland or following Petitioner's trial motion for discovery of Mr. Wood's statement prior to cross-examination thereby denying Petitioner's fundamental rights guaranteed by the due process clause of the Fourteenth Amendment..... 9

II. The Court should grant the Writ to determine whether, in this capital case, the trial court erred in refusing to charge the State's request to charge, concurred in by the Petitioner, which set forth a theory of felony murder.....13

III. The Court should grant the Writ to determine whether, in this capital case, the trial court erred in refusing to charge the sentencing jury specifically and in writing "that Dale Robert Yates did not kill the victim, Helen Wood.".....18

CONCLUSION.....32

APPENDICES

APPENDIX A. Opinion of South Carolina Supreme Court in State v. Yates, Opinion No. 21835 (December 22, 1982)

APPENDIX B. South Carolina Code of Laws, 1976,
as amended, Section 16-3-20.

APPENDIX C. Motion for Production and Inspection
of Evidence.

APPENDIX D. Response to Motion for Production.

APPENDIX E. Statement of Willie Wood.

APPENDIX F. Murder Indictment.

APPENDIX G. Notice of Evidence in Aggravation.

APPENDIX H. Order of South Carolina Supreme Court
denying Re-hearing and Granting Stay of Remittitur
pending filing of Petition for Writ of Certiorari
(February 24, 1983).

TABLE OF AUTHORITIES

CASES

<u>Brady vs. Maryland</u> , 373 U. S. 83 (1963).....	5, 7, 9, 11, 12, 13
<u>Gates vs. State</u> , 238 S. E. 2d 680 (1977).....	17
<u>Gregg vs. Georgia</u> , 428 U. S. 153 (1976).....	2
<u>Hicks vs. State</u> , 257 S. C. 279, 185 S. E. 2d 746 (1971).....	16
<u>James vs. Georgia</u> , 240 S. E. 2d 149 (1977, Ga.).....	12
<u>Johnson vs. State</u> , 257 S. E. 2d 149 (1977, Ga.).....	29, 30
<u>Judge vs. State</u> , 208 S. C. 497, 38 S. E. 2d 715 (1946).....	16
<u>Linder vs. State</u> , 276 S. C. 304, 278 S. E. 2d 355 (1981).....	16, 18
<u>Lockett vs. Ohio</u> , 438 U. S. 586, (1978).....	26, 29, 30
<u>Shaw vs. State</u> , 273 S. C. 194, 255 S. E. 2d 799 (1979).....	19, 20, 30
<u>Thompson vs. State</u> , 276, S. C. 616, ____ S. E. 2d ____ (1982).	16
<u>Woomer vs. State</u> , 276 S. C. 278, 277 S. E. 2d 696 (1981).....	16

STATUTES

28 U. S. C. Section 1257 (3).....	1
S. C. Code Section 16-3-20.....	2, 22, 23 25, 26, 28, 30

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term

DALE ROBERT YATES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.
_____PETITION FOR WRIT OF CERTIORARI OF
THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Dale Robert Yates prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported in State v. Yates, ____ S. C. ____, ____ S. E. 2d ____ (1982) and is attached hereto as Appendix A to this Petition.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on December 22, 1982. Timely petition for rehearing was denied on February 24, 1983, and petition for stay of execution was granted pending filing of Petition for Writ of Certiorari. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257 (3), petitioner having asserted below and asserting

herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides in pertinent part:

"Nor cruel and unusual punishments inflicted;"
and the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

"No state shall ... deprive any person of life, liberty or property without due process of law..."

2. This case also involves the provisions of Section 16-3-20 of the Code of Laws of South Carolina, 1976, as amended, a copy of which is attached hereto as Appendix B to this Petition.

STATEMENT OF THE CASE

Petitioner was tried for and convicted of the murder of Helen Wood. In accordance with South Carolina's capital sentencing statute, S. C. Code Section 16-3-20, et. seq., which is closely patterned after the Georgia death penalty statute considered by this Court in Gregg vs. Georgia, 428 U. S. 153 (1976), a separate sentencing proceeding was conducted before the trial jury at which time the State was required to prove beyond a reasonable doubt the existence of at least one statutory aggravating circumstance as a precondition for imposition of the death penalty. The State alleged that the aggravating circumstance was that Mrs. Wood's murder had been committed while in the commission of robbery while armed with a deadly weapon.

A review of the facts as supported by the Transcript of Record is appropriate. It appears that the petitioner, along with one Henry Davis, now deceased, appeared at the Wood's General Store in the afternoon hours of February 13, 1981. The store in question is located in a remote rural section of Northern Greenville County, South Carolina. The store is operated by the Wood family and has been for a number of years.

The petitioner was a passenger in the automobile driven by Mr. Davis. The automobile was stopped in front of the store operated by the Wood family and the petitioner, along with Mr. Davis entered the store. Petitioner was armed with a pistol and Mr. Davis was armed with a knife.

Both the petitioner and Mr. Davis entered the portion of the store where general merchandise was sold. The store was divided between the activities of the general merchandise and a small post office under a common roof. At the time of the appearance of the petitioner and Mr. Davis, Willie Wood was operating the general store and his sixty-seven year old mother, Helen Wood, was operating the post office.

The exact sequence of facts as to the robbery were in controversy at the trial. However, it appears that the weapons held by the petitioner and Mr. Davis were both presented to Mr. Wood and the money was demanded. It appears that the money from the cash register was given to Mr. Davis who at that point demanded that Mr. Wood "bend over the counter." Tr. p. 914. Mr. Wood resisted this command and testified that the other robber,

the petitioner, then fired a shot at Mr. Wood striking him in the hand. Mr. Wood testified at trial that, subsequent to the shot being fired, he did not see the petitioner thereafter. Tr. p. 916. It appears that the sound of the pistol summoned Mrs. Wood who entered the merchandise section of the store and encountered Mr. Wood and Mr. Davis in a struggle. During the struggle, Mrs. Wood was stabbed in the heart by Mr. Davis and Mr. Wood, with a pistol which he had in his possession, shot Mr. Davis to death.

An excerpt from the Transcript of the trial of testimony from the petitioner indicates the sequence:

- Q. Go ahead. At this point, you are backing and going toward the door and watching Mr. Wood, and you heard the statement of Henry (Davis), then, what happened?
- A. He said (referring to Davis), "lean over the counter." I was backing, I was doing this rather quickly, trying to get to the door and trying to watch what was happening back there. I didn't know what was going on. I just knew Henry wanted him to lean over the counter. He told him to. I figured he just wanted to keep him from being able to go under the counter and get a gun or something. So, I took a couple of more steps and Henry said, "shoot!" I turned around and the man's hands was down, I figured he had gone for a gun. So, I leveled mine off at him and fired right quick and his hands starting coming up and I just knew the man had a gun and was fixing to start shooting so I fired again. His hands came up empty. At this time, I heard a female voice say, "what's going on out there?" I said, "let's go." I turned and took two steps and was out the door. Tr. p. 1097, line 13 et. seq.

It appears that after the two shots were fired, one striking Mr. Wood in the hand and the other exiting the building through the rear wall, the petitioner ran to the automobile and got in on the passenger side, waiting for Mr. Davis. After the passage of sometime, when Mr. Davis did not return from the store, the petitioner slid across the seat to the driver's position and drove the automobile from the scene. He was apprehended within a short period of time after the incident.

The facts are undisputed that, while both Mr. Davis and the petitioner were armed and the wound to the hand of Mr. Wood was inflicted by the Petitioner, the fatal wound to Mr. Wood was inflicted by Mr. Davis and it further appears from the record that this wound was inflicted after the petitioner had left the scene of the robbery and was attempting an escape, never having seen the victim, Mrs. Helen Wood.

Prior to the trial of the case, counsel for the petitioner filed a motion for the production and inspection of evidence under the authority of Brady vs. Maryland, 373 U. S. 83 (1963). A copy of the motion is attached hereto as Appendix C of this petition. Hearing was held on the motion on April 17, 1981, and after much discussion, the trial court stated:

I will instruct the Solicitor to provide you with any evidence in his file or ... which naturally includes the police department investigating authorities, which is favorable to the defense on the guilt or penalty phase which he does not intend to introduce in evidence. Tr. p. 1651, line 17, et. seq.

The prosecutor responded on April 20, 1981, by letter, a copy of which is attached hereto as Appendix D. This response

did not include the statement given by Mr. Willie Wood, the only surviving witness, other than the petitioner, which was given to police authorities soon after the incident. This statement is attached to this petition and marked Appendix E.

At trial the petitioner renewed his motion for a copy of the statement of Mr. Wood prior to the introduction of his testimony. The trial court required that the prosecutor present to the court a copy of the statement and stated to counsel for the petitioner "I'll give it to you if you need it." Tr. p. 904, line 6. This pretrial statement by a critical witness was never shown to counsel for the petitioner during the trial of the petitioner.

At the conclusion of the testimony, both state and defense counsel submitted certain requests for charge to the trial court. The state's requests included the following:

A defendant is not responsible for a homicide committed by his co-defendant as an independent act, growing out of some private malice or purpose of the slayer, and not in furtherance of, or connected with, the original unlawful purpose, particularly where the common design did not contemplate the commission of a homicide, and was of such a nature that a homicide would not be a natural and probable result. A distinction has been made that, if the common design was to commit a trespass or a minor offense, the defendant is not liable for a homicide committed by the co-defendant unless it was a plain and direct consequence of the design, whereas, if the common design was to commit a felony, he is liable, although the homicide resulted collaterally therefrom. Tr. p. 1818.

This request by the state was joined by the petitioner on the basis that, all along, the prosecutor had insisted that he

was not pursuing the case under the felony murder doctrine and it was the position of the petitioner that the request indicated that the state was in fact seeking a vicarious liability to the petitioner. The requested charge was refused by the trial court.

After deliberations, the petitioner was found guilty of murder. The sentencing phase of the trial was conducted as prescribed by the statute and the petitioner, at the conclusion of the evidence, requested that the trial court charge to the jury as follows:

"That Dale Robert Yates did not kill the victim Helen Wood."

The trial court refused to charge this request in writing or in his oral instructions to the jury. Tr. p. 1314.

On appeal, the South Carolina Supreme Court affirmed the conviction and sentence of the petitioner, rejecting petitioner's challenges to the above recited procedures. See How the Federal Questions were Raised and Decided Below, infra.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. The petitioner filed a pretrial motion for discovery as authorized by the Brady case. At trial, the petitioner, upon the state calling Willie Wood as a witness, reaffirmed his desire to have produced and delivered to him a pretrial statement given by the prospective witness to police authorities. At trial, the trial court required the prosecutor to produce the statement to the court but not to petitioner's counsel. Following submission of briefs on appeal, the South Carolina Supreme Court stated as follows:

Appellant requested by way of discovery

an out of court statement made by Willie Wood. The trial court obtained a copy of this statement and advised appellant's counsel: "I'll give it to you if you need it." The statement contained the same basic facts as testified by Mr. Wood during the trial. The information within the statement is consistent with the indictment and trial testimony. The appellant was not deprived of information of which he was not already aware and which was actually available to him. See Appendix A.

II. At the conclusion of the trial on the guilt phase, the state requested the charge as quoted above and the appellant concurred in that request. The trial court denied this requested instruction. On appeal to the South Carolina Supreme Court, the petitioner excepted:

The trial court erred in refusing to charge the state's request to charge, concurred in by the appellant which set forth a theory of felony murder.

In its' rejection of this exception, the South Carolina Supreme Court stated that the state did not proceed on the felony murder theory and that the proposed charge was not a correct statement of the law applicable to the present case and, therefore, the trial court had correctly and precisely determined the applicable law and charged it.

III. Subsequent to the guilt phase wherein the petitioner was convicted of the offense of murder, the trial court was requested to instruct the jury as a mitigating circumstance in considering the penalty: "That Dale Robert Yates did not kill the victim Helen Wood." The trial court initially stated that the instruction would be given but later reversed itself and refused to give the instruction as requested by the petitioner. The Supreme Court of South Carolina, on reviewing this exception, held

that no error was committed by the trial court in this regard.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER, IN THIS CAPITAL CASE, THE TRIAL COURT ERRED BY REFUSING TO MAKE AVAILABLE TO THE PETITIONER AN OUT OF COURT STATEMENT BY STATE'S WITNESS WILLIE WOOD FOLLOWING A PRETRIAL DISCOVERY MOTION UNDER BRADY VS. MARYLAND OR FOLLOWING PETITIONER'S TRIAL MOTION FOR DISCOVERY OF MR. WOOD'S STATEMENT PRIOR TO CROSS-EXAMINATION THEREBY DENYING PETITIONER'S FUNDAMENTAL RIGHTS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Prior to trial, a motion for the production and inspection of evidence was filed on behalf of the petitioner. This motion, attached to this petition and marked Appendix C, was made pursuant to the holding of the United States Supreme Court in Brady vs. Maryland, 373 U. S. 83 (1963). Among a number of other items which the petitioner requested, was a statement made by Willie Wood. The petitioner submitted at trial that he left the scene of the alleged robbery and murder under the assumption that the incident was ended and certainly, prior to Mrs. Helen Wood entering the area of the store and subsequently being stabbed to death by Henry Davis. The only surviving witnesses to this incident were the appellant and Mr. Wood. Mr. Wood, during the process of the police investigation, gave a written statement to law enforcement officers the day after the incident. According to the motion filed by the petitioner, the petitioner contended that he was entitled to pretrial inspection of the statement by Mr. Wood under the following specifications of his motion:

- 1) Any evidence that the defendant did not by his own actions cause the death of

the decedent in this case, Helen Wood, including the following: Statements made by Willie Wood; 1 (d)

- 2) Evidence that the armed robbery, that is the taking of money, had been completed before any act of physical violence had been initiated by the defendant or his co-defendant, including any evidence of the following: Evidence that the co-defendant or the defendant had possession of the money taken from the Wood's store before any assault and battery had taken place; Evidence of the sequence of events including the taking of the money, the firing of the shots, and the stabbing of the deceased, Mrs. Wood; 4 (a) & (b)
- 3) Any evidence that the co-defendant, Henry Davis, on his own initiative was the first to initiate violence upon either Willie Wood or Helen Wood including: Evidence that Henry Davis assaulted either Willie Wood or Helen Wood before the defendant fired a shot; Evidence that the assault on Helen Wood occurred after the defendant was either on his way out of the store, or had left the store; Any evidence that the shooting of the co-defendant, Henry Davis, by the victim, Willie Wood, occurred after the defendant had either left the store, or was on his way out of the store; 5 (a), (b) & (c)
- 4) Any evidence which tends to show that Mrs. Helen Wood was not in the defendant's presence when the actual armed robbery took place; 13
- 5) Evidence that the knife found near the body of co-defendant Henry Davis was used in the stabbing death of Helen Wood. 14

According to the petitioner, the statement of Willie Wood was exculpatory as it related to the death of Helen Wood. If true, the statement of Willie Wood should indicate that Helen Wood was killed by Henry Davis with a knife. It would further indicate that

the appellant had inflicted no fatal wounds upon anyone and it would also indicate that the petitioner was in no way involved in the struggle or in the presence of the struggle between Willie Wood, Helen Wood and Henry Davis at the time of Helen Wood's death.

The petitioner contended in his pretrial motion that any such statement given by Mr. Wood was discoverable under the Brady authority. The statement indicated that the petitioner had not taken the life of Mrs. Wood and in fact supported the petitioner's position that he was not present at the time Mrs. Wood was killed. At no time during the trial was the state required to present to the petitioner the statement in question.

At the time Mr. Wood was called to testify during the trial, the petitioner renewed his request for a copy of the statement, not only on the Brady theory but also as a possible tool to be used during the cross-examination of the witness. Tr. p. 903. At that time, the trial court requested that the solicitor produce a copy of the statement and present it to the court. The court stated to petitioner's counsel, "I'll give it to you if you need it." Tr. p. 904, line 6.

In affirming the trial court, the South Carolina Supreme Court made no mention of any application of the Brady decision. The Court found that the statement in question "contained the same basic facts as testified by Mr. Wood during the trial. The information within the statement is consistent with the indictment and trial testimony. The appellant was not deprived of information of which he was not already aware and which was actually available to him."

Petitioner reminds this Court that he was indicted for murder and contends here as before that evidence in possession of the prosecutor which tended to show that he did not inflict the fatal blow and, by inference, indicated that he was not present at the time of the killing was discoverable under Brady authority. As cited above, the trial court stated that the prosecutor was to deliver any exculpatory evidence which the prosecutor did not intend to place into evidence. The statement was never introduced into evidence and therefore should have been discoverable, even under the trial court's interpretation.

Assuming however that this Court concludes that the Brady decision would not require the production of the pretrial statement of a critical witness, there still remains the question of whether the petitioner should have had access to the statement during the testimony of the witness at trial. The trial court stated to counsel: "I'll give it to you if you need it." While petitioner was unable to rely upon case authority from South Carolina dealing with his right to access to the statement in question, on review, the appellate court was pointed to the Georgia case of James vs. Georgia, 240 S. E. 2d 149, (1977). The James case held that in general, defense counsel should be entitled to prior statements of key witnesses upon proper demand. If their testimony is consistent with their statements, then no harm can be claimed by the production of such a document. If, on the other hand, they testify differently from their out of court statements, then the witness should be interrogated as to the inconsistencies appearing in their statements. The refusal by the trial court to grant to the petitioner this right denied to the petitioner a potentially

valuable right guaranteed to him by due process standards when his request for a statement of the nature involved in the case at bar is denied. The trial court examined the statement and refused to present it to the petitioner's counsel for the purpose of perusal and possible use during cross-examination. The petitioner contended that this action constituted error and that the trial court should not be allowed to substitute its wisdom for defense counsel's ability to make use of a statement of this nature as an impeachment tool, particularly when the state seeks the ultimate penalty and the statement apparently would establish that the petitioner did not strike a fatal blow. Failure of the trial court to either order the statement produced under the Brady motion or allow inspection of the statement by defense counsel prior to the cross-examination of the key witness involved in the prosecution and the subsequent affirmance of this action by the South Carolina Supreme Court constituted error and denied the petitioner due process of law as guaranteed under the Fourteenth Amendment to the United States Constitution.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER, IN THIS CAPITAL CASE, THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE STATE'S REQUEST TO CHARGE, CONCURRED IN BY THE PETITIONER, WHICH SET FORTH A THEORY OF FELONY MURDER.

Throughout the proceedings, the petitioner insisted that the prosecutor was pursuing a murder charge against him on the basic concept of felony murder. During pretrial motions, the language of the indictment against the petitioner was attacked. A copy of the indictment in question is attached hereto and identified as

Appendix F. The trial court held that the State of South Carolina did not distinguish between common law murder and felony murder and that the indictment did not, on its face, charge felony murder.

Subsequently motion was made by the petitioner to strike the language contained in the notice of evidence in aggravation served upon the petitioner prior to trial. This notice is required by the death law statute and is attached hereto and identified as Appendix G. The basis for the motion by the petitioner was that the state intended to convict the petitioner of the crime of murder based upon his participation in a felony resulting in the death of Mrs. Wood and then, at the sentencing stage, again present to the jury the underlying felony which had been used to obtain the conviction of murder in the first place. Oral arguments on the motion to strike the evidence in aggravation on the "felony-merger" theory were presented to the trial court at Tr. p. 1684 and a written brief in support of defendant's motion was submitted for the court's consideration at Tr. p. 1795, et. seq. All oral and written motions with regard to this matter were denied by the trial court.

At the conclusion of the testimony in the guilt phase of the trial, the prosecutor submitted the following written request to charge to the court:

A defendant is not responsible for a homicide committed by his co-defendant as an independent act, growing out of some private malice or purpose of the slayer, and not in furtherance of, or connected with, the original unlawful purpose, particularly where the common design did not contemplate the commission of a homicide, and was of such a nature that the homicide would not be a natural or probable result. A distinction has been made that, if the common design was to commit a trespass or a minor of-

fense, the defendant is not liable for a homicide committed by the co-defendant unless it was a plain and direct consequence of the design, whereas, if the common design was to commit a felony, he is liable although the homicide resulted collaterally therefrom. Tr. p. 1818.

The trial court refused to charge the state's request and thereafter the defense concurred in the request by the state for the trial court to charge the proposed instruction. This was similarly refused by the trial judge. Tr. p. 1161, lines 22, et. seq.

The petitioner argues that it was error for the trial court to refuse this request to charge. The request charged a vicarious liability theory of responsibility, a concept that the petitioner had argued throughout the entire trial was being sought by the state to convict the petitioner of the murder charge. The petitioner had contended that the indictment was a statement of vicarious liability on the part of the petitioner. The killing of the victim having been allegedly performed by another. The petitioner had, both in writing and orally, urged the court to strike the "evidence in aggravation" on the grounds that the state sought a conviction of the petitioner on a vicarious liability theory and that the underlying felony used to obtain the conviction would then be submitted to the sentencing jury as evidence of aggravation.

In dealing with this exception on appeal, the South Carolina Supreme Court made the following findings:

Appellant and Henry Davis planned and jointly executed an armed robbery. The Appellant was armed at the time of the robbery with a pistol which he used to shoot Mr. Wood, from whom money was taken. Appellant drove away only after he (Appellant) thought Davis had been caught. Meanwhile, Davis had stabbed Mrs. Wood to death.

"One who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Woomer, 276 S. C. 278, 277 S. E. 2d 696 (1981). State v. Hicks, 257 S. C. 279, 284, 185 S. E. 2d 746, 748 (1971). South Carolina adheres to the common law rule of murder and makes no distinction between murder and felony murder. State v. Thompson, 276 S. C. 616, S. E. 2d (1982), citing State v. Judge, 208 S. C. 497, 38 S. E. 2d 715 (1946). The evidence made a jury issue as to the murder charge.

Appellant asserts as error the trial judge's refusal to charge the state's request number 3, concurred in by the Appellant, which set forth a theory of felony murder. As stated above, the state did not proceed on the felony murder theory. The proposed charge was not a correct statement of the law applicable to the present case. The trial judge must determine the law to be charged from the evidence presented. State v. Linder, 276 S. C. 304, 278 S. E. 2d 355 (1981). We are of the opinion that the trial judge correctly and precisely determined the applicable law and charged it.

In its opinion, the Supreme Court of South Carolina states that the prosecutor did not proceed on the felony murder theory. What this ignores is that the prosecutor himself requested that the charge as cited above be given to the jury. Certainly, the prosecutor himself would know better what theory he had proceeded on than the appellate court. The requested charge, since it reflected at least one version of the facts that had been presented, should have been charged to the jury. The charge, argues petitioner, would have placed the issue of vicarious liability more clearly before both the South Carolina Supreme Court on appeal and this court with respect to the decision to strike the armed robbery as an aggravating circumstance.

The charge at issue was not a contested request. The state had asked for the charge and the defense had concurred. In refusing the charge, the trial judge stated that it "is not a correct statement of law as applies to this case." Tr. p. 1162, line 25, et. seq. The petitioner suggests to this court that there were facts presented at trial which proved that there was a common design to commit a felony, that is armed robbery. The petitioner further contends that there was evidence presented at trial, and the reasonable inference is from such evidence, which could have led to the conclusion that the "homicide resulted collaterally" from the felonious design. The failure to charge this request in light of the concurrence of the parties and the undisputable factual support of the underlying theory that the charge represents, was error on the part of the trial court. A charge must be given based upon the evidence at hand and must be determined by the evidence presented. State vs. Gates, 238 S. E. 2d 680 (1977).

The petitioner submits that there was evidence that the common design did not specifically contemplate a homicide. The petitioner testified on that point as follows:

- Q. If the person did not give you the money, or Henry the money, or whoever, what were you supposed to do?
- A. Leave and get away out of the area quick, just as if we'd got the money. Just get out of there to avoid the police catching us. Tr. p. 1085, lines 11-15.

Petitioner further testified that his actions upon hearing a woman's voice were consistent with the plan which did not contemplate a homicide:

- A. At that time, I heard a female voice say, "what's going on out there?" I said, "let's go." I turned and took two steps and was out the door. Tr. p. 1098, lines 3-6.

Petitioner argues that there was abundant evidence that would support the charge requested by the state and the defense and refused by the trial court. This refusal by the trial court constituted error and the handling of the matter by the South Carolina Supreme Court simply does not correct the error. The conclusion by the appeals court that the prosecutor did not proceed on the felony murder theory when in fact it was his request in the first place simply is not consistent with the circumstances of the case and does not take into consideration the testimony contained in the record. As cited by the appeals court, the trial judge must determine the law to be charged from the evidence presented. State vs. Linder, supra. The evidence supported the requested charge and it was error to refuse it.

III. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER, IN THIS CAPITAL CASE, THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE SENTENCING JURY SPECIFICALLY AND IN WRITING "THAT DALE ROBERT YATES DID NOT KILL THE VICTIM, HELEN WOOD."

Upon having been convicted of murder, at the conclusion of the sentencing phase of the bifurcated trial, as provided by South Carolina death penalty law, the petitioner submitted to the trial court "defendant's request to charge number two" as follows:

That Dale Robert Yates did not kill the victim, Helen Wood.

This request for charge was refused by the trial court. Tr.

p. 1314. The petitioner argues that it was error for the trial court not to submit this specific request to charge to the jury in written or oral form.

The petitioner argues that the fact, proved by him at trial and uncontested by the prosecution, that his co-defendant, Henry Davis, killed Helen Wood, was the single most important mitigating factor offered and proven in his entire trial. All evidence pointed to the fact that the fatal wounds in this case had been inflicted by Mr. Davis. The fact that an individual, who is charged with murder which could result in a death sentence, did not in fact take the life of the victim, is always an important factor in such a case. The South Carolina Supreme Court has similarly held and emphasized the importance of this distinction in State vs. Shaw, 273 S. C. 194, 255 S. E. 2d 799 (1979):

There is no evidence that Mahaffey was a trigger man. This one fact is sufficient to distinguish Mahaffey from Roach and Shaw for purposes of the death penalty.

It is arguable that, since the South Carolina Supreme Court has held that the fact that a defendant in a capital case was not a "trigger man" is sufficient to distinguish him from others who in fact caused the death of the victim, that failure to give appropriate weight to such a factor in the jury instructions at the penalty phase could constitute an error as a matter of law. The non-trigger man status of the petitioner was undisputed throughout the proceedings. It was a factor presented on the face of the indictment. It was a factor accepted by both sides of the case throughout the trial.

The cited Shaw case also held that a defendant could not successfully attack his conviction and sentence of death based upon a theory that the prosecutor's decision to seek death against him as a trigger man and not as against his co-defendant as a non-trigger man was arbitrary and capricious. The petitioner argues that since the distinction between non-trigger man and trigger man is so significant to the South Carolina Supreme Court that any refusal to charge the jury in the sentencing phase that a defendant was a non-trigger man may be closely scrutinized in light of the principles which that court has set forth in the Shaw case. Otherwise, a non-trigger man like the petitioner, while equally guilty of murder under the law would be given the same punishment in the penalty phase without adequate consideration of his individual acts and his non-trigger man status. It is clear that the South Carolina Supreme Court has taken extreme steps to recognize a difference between those legally guilty of murder under a vicarious liability theory and those who deserve the death penalty:

While these defendants are equally guilty of the crime of murder as defined by the laws of this State, they are not ipso facto deserving of the same punishment. State v. Shaw, supra.

The petitioner argues that his non-trigger man status was trivialized by the trial court's failure to charge his factually supported request. It is not a case of the jury being unaware that the petitioner did not personally stab Mrs. Wood to death. The evidence was clear on that point. The point is that the jury, because the court did not charge petitioner's request in written or oral form, did not have the proper perspective as to the legal importance of the fact that the petitioner did not kill the victim.

The same jury tried the guilt phase and penalty phase of petitioner's trial. In the guilt phase, the trial court had instructed the jury that it did not make any difference that Henry Davis stabbed Mrs. Wood and that the petitioner had inflicted no fatal blows. Under the law of murder, the petitioner could still be guilty and the jury so found with their verdict. Failure to give proper weight by charging petitioner's request operated as an endorsement of the "hand of one, hand of all" vicarious liability concept in the penalty phase. The failure to distinguish between petitioner's guilt on the murder charge and the absence of evidence that he had killed the victim at the penalty phase was error.

On appeal to the South Carolina Supreme Court, the appeals court held that the trial court had satisfied the death penalty code by submitting the following instructions to the jury:

Secondly, the defendant asks you to consider that the defendant was an accomplice to the murder, committed by another person, and his participation was relatively minor. In other words, that embraces the theory that the defendant did not, himself, personally strike the fatal blow.

Petitioner argues that it is simply unreasonable to expect a jury that has just convicted a man of murder on a vicarious liability (hand of one, hand of all) theory to set that concept aside and move on. Juries can, and must, distinguish the guilt phase from the penalty phase of bifurcated death penalty trials. This can be accomplished but, in a case such as petitioner's where so much stress was placed upon the vicarious liability theory (indictment, argument, charge), the petitioner argues that it is incumbent upon the trial court to emphasize the importance of the fact that

the petitioner on trial did not do the actual killing.

Petitioner argues that the trial court's decision not to charge that he did not kill Mrs. Wood was based on erroneous conclusions. Clearly, the trial court rejected the request to charge that the defendant did not kill Helen Wood:

Mr. Henry, I am not going to submit in writing the language which you requested something to the effect that the defendant did not kill Helen Wood. Tr. p. 1314, lines 3-6.

The factual basis of the request was established beyond any doubt. The petitioner had offered the request in advance of the judge's charge and in written form. The arguments by the state's attorney offered to defeat the instructions were two: That there was no statutory authority for such a charge and that to charge the request would be repetitive in light of the statutory mitigating circumstance that says: "The defendant was an accomplice in the murder committed by another person and his participation was relatively minor." S. C. Code Section 16-3-20 (c) (b) (4).

The discussion between counsel and the court over whether or not the charge would be given took place on the afternoon of May 1, 1981, and the morning of May 2, 1981. Initially, after argument by petitioner's counsel that the charge should be given by the court, the following discussion took place between the court and the state's attorney:

"THE COURT: All right, sir, I'll include that one if that's the only one you've got here.

SOLICITOR WILKINS: Your Honor, may I respond to that. You are talking about submitting that, in writing, to the jury?

THE COURT: Yes, sir.

SOLICITOR WILKINS: I submit to Your Honor that there is no statutory authority for that.

THE COURT: Well, I'm afraid there is. "C" says "that the judge shall include in his instructions to the jury any mitigating circumstances authorized or allowed by law, and any of the following statutory aggravating and mitigating circumstances", which seems to talk about any mitigating circumstance authorized or allowed by the law and then goes on to talk about the statutory things we've got. However, as it would provide for an interminable situation if the defendants asked for much, but if that's the only one they are going to ask for, I'm going to grant them that one.

SOLICITOR WILKINS: Of course, the question is, what is allowable by law, and it certainly doesn't say about submitting that in writing. It says over here, "the statutory instructions, aggravation and mitigation", referring to statutory, "shall be given in charge and in writing."

During the May 1, 1981, discussion between the court and the prosecutor, the trial judge stuck to his position that the charge was proper and that it was not prohibited by the statute. In addition, the prosecutor offered the second argument for not charging the petitioner's request: that the statutory mitigating circumstance in Section 16-3-20 (c) (b) (4) already covered it.

SOLICITOR WILKINS: Where is any authority where it is allowed by law or is that just a discretionary matter with the Court, because the statutory mitigating circumstance is already covered where the victim was an accomplice and his participating was relatively minor. What we are doing is submitting two mitigating circumstances which say the same thing, to reemphasize the point. I don't think the mitigating circumstances should be placed in bold print no more than aggravating circumstances. And by doing this, it is going to duplicate one of the statutory mitigating

circumstances and place undue emphasis on it." (Tr. p. 1309, lines 20-25, Tr. p. 1310, lines 1-7).

It is apparent from the record that the prosecutor felt that he had lost the argument on the statutory basis for the charge in writing. He then moved on to the "undue emphasis" argument. At that point, the trial judge set the decision on the request to charge aside. (Tr. p. 1310, line 8).

On May 2, 1981, when court resumed, the following exchange took place, this time between the court and defense counsel.

THE COURT: Mr. Henry, I am not going to submit, in writing, the language which you requested, something to the effect that the Defendant did not kill Helen Wood. In order for the jury to be aware that they are not limited to statutory mitigating circumstances in their consideration, I am going to submit in writing, the four statutory mitigating circumstances which you request and as a fifth one any other mitigating circumstance which the Defendant presents for your consideration, so as for them to be fully apprised that they are not limited to statutory circumstances. (Tr. p. 1314, lines 3-14).

Without further argument on May 1, 1981, the court had ruled that "I'm going to grant them that one". The next morning the court ruled that "I am not going to submit, in writing, the language which you requested, something to the effect that the defendant did not kill Helen Wood". The change in position was very dramatic petitioner suggests, particularly when read in light of the court's almost adversary support of the theory that the state death penalty law provided a basis for non-statutory mitigating circumstances to be put in writing.

Immediately upon the announcement of the court's ruling re-

versal, defense counsel asked the court for the reasons for the decision not to charge the request:

MR. HENRY: Your Honor, could you tell us your reason for that decision. I want to know whether it was as to one or two arguments presented by the State. One was the issue of whether or not you could present non-statutory elements or whether or not it is duplicate. (Tr. 1314, lines 15-20).

In reply to this request, the court answered:

THE COURT: Well, I think they both apply in this particular case, because that is absolutely embraced by the statutory mitigating circumstances on which you rely and that is that he was an accomplice and his participation was relatively minor. (Tr. 1314, lines 21-25)

The trial court, after arguing against the prosecutor's position that State law prevented the court from charging non-statutory circumstances, and without having heard further argument on that issue, had changed his position. The change in his position was done without any discussion about the statute. Instead, the court seemed to shift his emphasis to the second argument against the charge, i.e. that it was already covered by the statutory mitigating circumstance represented in Section 16-3-20 (c) (b) (4).

After first agreeing with the charge, and then rejecting the charge, the trial court did another switch. He was asked, as a compromise measure, if he would charge that the petitioner did not strike the fatal blow. He rejected such a request. (Tr. 1316, lines 12-14). However, he charged some form of that orally but not in writing. (Tr. 1362, lines 7-9).

Petitioner argues that there was no reason given or available not to charge that he did not kill Helen Wood. The trial judge himself argued very persuasively that reason existed in 16-3-20 (c) in favor of charging a non-statutory request. And, when he later rejected the charge he made no effort to refute his own earlier arguments on this point.

The language in 16-3-20 (c) relative to the charge of non-statutory mitigating circumstances reads as follows:

The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence. (Emphasis added).

Clearly, the legislature has made a distinction for trial judges with respect to the treatment of non-statutory mitigating circumstances and non-statutory aggravating circumstances. There are no non-statutory aggravating circumstances. However, as was clear after Lockett v. Ohio, 438 U. S. 586, 98 S. Ct. 2954 (1978), state courts must include non-statutory mitigating circumstances so that the jury can consider these in spite of the listed mitigating circumstances set forth in the statute. Mitigation of death is placed in a different position than is aggravation of death. A statute which prevents the jury's consideration of all circumstances in mitigation violates the constitution.

In addition to the preferential treatment given to mitigating circumstances by the United States Supreme Court in Lockett, Section 16-3-20 (c) requires ("shall include") that trial judges charge mitigating circumstances listed by statute ("statutory mitigating circumstances" and "any mitigating circumstances other-

wise authorized or allowed by law". The term "otherwise authorized or allowed by law" should not serve to prohibit the charging of the defense request that petitioner did not kill Helen Wood.

Petitioner argues that Lockett "authorizes" the charge to be given in written and oral form. Petitioner argues that the South Carolina Death Penalty Law "allows" the charge to be given, if for no other reason that there is nothing in the statute to prohibit such a written or oral charge.

The only argument that the charge was not "allowable" is that the statutory mitigating factor already included the charge requested by the petitioner. This position, initially rejected by the trial court itself, is untenable. The prosecutor cited no case law supportive of a position that the trial court could not charge any non-statutory circumstance he felt was appropriate. There is no case law which would prevent a trial judge from instructing a non-statutory circumstance which was repetitive vis a vis the statutory circumstances already charged. Appellant argues then, that the decision by the trial court not to instruct the jury that petitioner had not killed the victim was based upon the court's discretion, not upon any legal impediment.

Similarly, there is no case authority which would prevent a trial court, in order to give appropriate weight to a mitigating factor, from charging, orally and in writing, a charge which emphasized or otherwise clarified a particular mitigating factor.

Since the trial court apparently felt that he could not, consistent with existing law, charge petitioner's request, and since no such legal inhibition actually exists, petitioner asks this Court to hold that the trial court's refusal to charge was

error.

Assuming that the trial judge's decision was based upon his belief that the instruction was repetitive as the prosecutor had argued, Appellant next argues that the requested charge was not in fact repetitive, and that the trial court abused its discretion by failing to submit the charge orally or in writing.

Section 16-3-20 (c) (b) (4) reads as follows:

"The defendant was an accomplice in the murder committed by another person and his participation was relatively minor."

Petitioner argues simply that a juror, a reasonable juror, could find that petitioner's action which brought about the murder of Helen Wood was not relatively minor and still find as a mitigating factor that petitioner did not kill Helen Wood. There is nothing repetitive about the requested charge, "Dale Yates did not kill the victim, Helen Wood." Additionally, and as the prosecutor took advantage of in closing argument (Tr. 1323, lines 24-25), the "participation" question is confusing and could have been seen as relating to the armed robbery and not the murder itself.

It would have been repetitive if the requested instruction had been "Dale Yates was an accomplice". Those words and that meaning are already contained in Section 16-3-20 (c) (b) (4). However, the statutory instruction is not coterminous with the requested non-statutory charge. The two charges are different factual and legal entities.

The failure to charge that petitioner did not kill Mrs. Wood was error since the charge was not repetitive with respect to the statutory instruction. It is easily seen that a juror could

find that petitioner's involvement was not "relatively minor" yet still decide that a life sentence was appropriate because, after all, he did not kill the victim.

The point could be argued that, although the statute doesn't prevent such a charge and although the charge requested was not in fact a repetition of the statutory instruction, that the jury had certainly understood the fact that petitioner had not killed the victim and had ample opportunity to vote for a life sentence on that factor alone. This position is specious in light of Lockett, Shaw, and State v. Johnson, 257 S. E. 2d 597 (1979, N. C.). In Lockett, of course the matter of mitigating circumstances was considered in light of the Ohio statutory complex. The Court found that the Ohio law was unconstitutional because it removed the consideration of certain mitigating circumstances, circumstances which could be considered for a life sentence, from the jury's province. The underlying principle of Lockett is applicable here.

In Lockett, the jury had no chance to consider certain mitigating factors which they could have found to justify a life sentence. In petitioner's case, the trial court's erroneous legal conclusion (that the law did not allow such a charge) and his failure to charge the request orally or in writing, had the practical impact of taking the consideration of the fact that the petitioner had not killed the victim out of their hands. In petitioner's situation, the jury did not have in its hands the mitigating factor that the petitioner had not killed the victim. They did have other factors, less important factors. They had in their hands factors which would not persuade them to vote for a life sentence.

Petitioner argues that, with a written instruction as requested in their possession during deliberation, the jury would have had the opportunity to realistically give consideration to the single most important factor favoring a life sentence: that the petitioner did not kill the victim. A factor recognized by this Court in Shaw as being the one fact which would be "sufficient" by itself to justify a life sentence. The impact of refusing an oral or written charge in petitioner's case had the same practical effect as was condemned by the Supreme Court in Lockett.

Finally, the North Carolina Supreme Court, interpreting their own statute on the question of non-statutory v. statutory mitigating circumstances in light of Lockett wrote:

"The legislature did not intend to give those mitigation circumstances expressly mentioned in the statute primacy over others which might be included in the "any other circumstances" provision."

"For if the sentencing authority cannot be precluded from considering any relevant mitigating circumstance supported by the evidence neither should such circumstances be submitted to it in a manner which makes some seemingly less worthy of consideration than others." State v. Johnson, 257 S. E. 2d 597 (1979, N. C.)

South Carolina, of course, also has an "any mitigating circumstances" section (16-3-20 (c)) like that of the North Carolina law. Petitioner argues that the South Carolina Supreme Court, in this case, should have followed the reasoning in the Johnson decision and found that the requested charge was not prohibited by the South Carolina Death Penalty Law, that the charge was not a repetition of Section 16-3-20 (c) (b) (4), that the charge itself represented a factor which, if properly presented could have had an

impact on the sentencing process and that it was error for the trial court to refuse such a charge as requested in writing or orally.

In the final form, the trial court, contrary to his earlier ruling (Tr. 1316, lines 12-14), charged as to this matter as follows:

"Secondly, the Defendant asks you to consider that the Defendant was an accomplice to the murder, committed by another person, and his participation was relatively minor. In other words, that embraces the theory that the Defendant did not, himself, personally strike the fatal blow." (Tr. 1362, lines 4-9)

Petitioner argues that this oral charge did not state the instruction as requested. Additionally, petitioner submits that only the 1st sentence of the above quoted instruction was reduced to writing and sent into the jury room. The requested instruction was supported by the facts, was of mitigating value and was not prohibited by law. There was no legal justification for the trial court not to charge the request in writing and orally. The trial court's failure to charge under these circumstances was an abuse of discretion and requires reversal of petitioner's death sentence.

It is imperative, argues petitioner, that proven, legally allowable and outcome determinative requests to charge by the defendant be given in the form requested so that the jury is not given the option of rejecting these from their deliberative process. Clearly the written instructions carry more weight than those given orally. In fact the charge in this case adds credence to that claim:

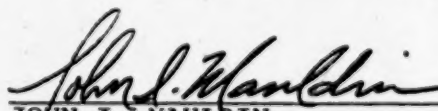
"I will give you these to take with you to your jury room, so that you will have in writing the various aggravating or mitigating circumstances which you should consider." (Tr. 1362, 16-18) (Emphasis added).

With this kind of a charge and without an oral statement, let alone a written endorsement of the fact that the petitioner did not kill Helen Wood, petitioner argues that the jury was not given an adequate opportunity to consider the single most important factor in the decision of whether to impose the death penalty or life imprisonment. Without giving the requested written instruction, and by giving the above charge which placed written charges in a position preferential to those given only orally, the trial judge abused its discretion. Petitioner asks this Court to reverse his death sentence for the trial court's failure to charge orally and in writing that he did not kill the victim, Helen Wood.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari, apply the legal standards which the Eighth and Fourteenth Amendments require, and vacate petitioner's sentence of death.

Respectfully submitted,



JOHN I. MAULDIN
Attorney at Law

710 East McBee Avenue
Greenville, South Carolina 29601
(803) 271-3812

ATTORNEY FOR THE PETITIONER

APRIL 25, 1983.

APPENDICES A-H

APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,
v.
Dale Robert Yates, Appellant.

Appeal From Greenville County
C. Anthony Harris, Judge

Opinion No. 21835
Filed December 22, 1982

AFFIRMED

Stephen J. Henry and John I. Mauldin, both of Greenville; and South Carolina Commission of Appellate Defense, of Columbia, for appellant.

Attorney General Daniel R. McLeod, Senior Assistant Attorney General Brian P. Gibbes and Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor William B. Traxler, of Greenville, for respondent.

PER CURIAM: Appellant, Dale Robert Yates, was indicted and convicted of murder, armed robbery, assault and battery with intent to kill, and conspiracy. After being found guilty of murder, the jury recommended at the second phase of the bifurcated trial, that he should die by electrocution. From these convictions and sentence, he appeals. The basic issue involved in the appeal is whether the death sentence should be carried out.

On February 12, 1981, David Loftis (not on trial), Henry Davis (killed in the robbery), and Appellant Yates talked about various places to rob and rode around in the car of Davis looking for a store which could be easily robbed. As a part of the plan, they borrowed a gun from the Appellant's brother. On the following day, February 13, they continued to ride around, casing places to rob. The Appellant and Davis left Loftis (who turned state's evidence) at a shopping mall and drove away with the pistol under the passenger's side of the front seat. The Appellant and Davis subsequently entered Wood's rural store, by the Appellant's own testimony, for the purpose of committing armed robbery. Appellant was armed with the pistol and Davis with a knife. They demanded and received approximately \$3,000 from Willie Wood, who was alone and in charge of the store operation. When Willie Wood failed to cooperate to the satisfaction of the robbers, the Appellant shot him, but not fatally. About that time, the mother of Willie Wood, who was the postmistress in the adjoining building, came upon the scene. The Appellant ran out of the store, taking the money and the gun. Davis remained in the store, and stabbed Mrs. Wood to death with his knife. Willie Wood succeeded in obtaining a gun and killed Davis. After Appellant waited in Davis' car and concluded that Davis had been caught, he drove off, hid the money and pistol in a wooded area, and was later apprehended.

The Appellant testified in his own behalf. His testimony was not inconsistent with the facts recited above. It was his contention that he did not kill Mrs. Wood and that it was his intent all along to abandon the robbery without hurting anybody if the victims refused to cooperate.

The Appellant has stated forty exceptions in quest of a reversal of the convictions and sentence. These exceptions have been argued in the form of twenty questions as included in the Appellant's Brief.

The first three questions submit error on the part of the trial judge in (1) qualifying jurors Volpe, Wallace, Springfield, and Trammell, (2) in excusing certain jurors because of their opposition to capital punishment, and (3) refusing to excuse prospective jurors because of their response to voir dire questions. We have reviewed the relevant portions of the record dealing with these exceptions and the jurors involved. The interrogations of jurors must be considered as a whole. The qualifications should not be determined on the basis of isolated questions and answers not truly meaningful. The judge must exercise his discretion in qualifying and excusing jurors. We find no error. Certainly, there is no abuse of discretion. Appellant's rights, under Witherspoon v. Illinois, 291 U.S. 510 (1968) have not been violated. Principles enunciated in that case have been respected and applied.

Next, Appellant asserts that the trial court erred in denying the motions for change of venue, a change of forum and for additional peremptory challenges. The first two of these are discretionary; peremptory challenges are controlled by statute. We find no showing that this discretion has been abused or that Appellant has suffered from actual juror prejudice. State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1982), State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981). The trial court properly denied these motions.

Early on, we point out that throughout the trial, the prosecuting attorney made it clear that he was not prosecuting the Appellant on the theory of a felony murder. It was his contention that both Appellant Yates and deceased Davis were present aiding and abetting each other in the commission of a planned armed robbery and that the hand of one was the hand of all. The judge charged the law of common law murder applicable in this state.

Appellant argues that the trial court erred in denying his motion to strike armed robbery as an aggravating circumstance. The possibility that Appellant was convicted on a theory of vicarious liability and then sentenced to death based upon the aggravating circumstances of armed robbery which was the foundation of the original murder conviction is asserted by Appellant to be reversible error.

The trial judge in the penalty phase of the trial instructed the jury that the only statutory aggravating circumstance which they were to consider was the murder which was committed while the Defendant was in commission of the crime of robbery while armed with a deadly weapon. This is a statutory aggravating circumstance pursuant to South Carolina Code §16-3-20(c)(a)(1)(e) (Cum. Supp. 1981). Since this state adheres to the common law rule of murder and makes no distinction between murder and felony murder, a statutory aggravating circumstance of murder in a death penalty case remains as such regardless of whether the crime charged is murder or felony murder. State v. Thompson, supra. The Appellant is equally responsible for the stabbing death of Mrs. Wood, even though he did not actually cast the fatal blows. Appellant and Henry Davis entered the store armed and did commit a robbery. As a direct result of their joint actions in committing the armed robbery, Mrs. Wood was killed.

That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge. Lockett v. Ohio, 438 U.S. 586, 602, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

There was no error in the trial judge's denying Appellant's motion to strike armed robbery as an aggravating circumstance.

Appellant further argues that the trial court erred in denying Appellant's motion to authorize the spending of certain state funds pursuant to South Carolina Code §16-3-26(C) for a jury selection expert and for an expert as to the non-deterrent effect of capital punishment.

The decision of the amount of statutory funds to be expended rests in the discretion of the trial judge. This court will not disturb such decisions absent a showing of an abuse of that discretion. Appellant requested a five-hundred dollar fee for a jury selection expert. This expert stated that he would provide his expertise regardless of whether or not the court ordered the payment of his fee. His services were available in spite of the lower court's refusal to authorize such funds.

We are of the opinion that the trial judge did not abuse his discretion in denying these requests. This statute does not require the trial judge to honor every request made by defense counsel. But only those requests that ". . . are reasonably necessary for the representation of the defendant. . . ." The court is empowered to decide which requests are appropriate. No error.

Appellant asserts that the trial court erred in allowing the Solicitor to express his opinion of the deterrent effects of capital punishment in argument to the jury. In reviewing this argument, as a whole, we find the argument to be within the parameters permitted by this Court. The Solicitor's argument was acceptable and well within the confines as set forth by the lower court. The trial judge stated before these arguments that both sides would be allowed wide latitude in arguing their respective positions concerning the deterrent effect of capital punishment.

Appellant challenges the trial court's refusal to enjoin the Solicitor from seeking the death penalty in his case. Appellant based this challenge on the prosecutor's record of handling previous death penalty cases involving triggermen and non-triggermen. A triggerman is the person who actually fires the fatal shots or uses the deadly weapon to cause a death. Appellant argues that the Solicitor normally sought the death penalty only against the triggerman.

It would be error for the trial judge to tell a Solicitor how to determine whether the death penalty should be sought. This is the prerogative of the Solicitor. The exception is without merit.

Appellant's motion seeking to prevent pre-trial press coverage of the preliminary hearing was properly denied by the magistrate in question. Appellant has failed to show any actual prejudice by the press coverage or the magistrate's handling of this one limited purpose phase of the trial.

The trial judge's finding of ". . . fact beyond any reasonable doubt that this defendant is competent to stand trial. . ." is well supported by ample evidence before the lower court. Appellant's exception as to his competency to stand trial is without merit.

Appellant asserts that it was error for the trial court to deny his request for separate juries in the guilt and penalty phase of the trial. Also, it was error to excuse potential jurors who were opposed to the death penalty. The death penalty statute in South Carolina does not contemplate or provide for two separate juries in such a trial. This court has resolved the issue of disqualifying jurors who oppose the death penalty adversely to the Appellant in State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981) and State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980).

When Appellant was testifying in his own behalf, the State, at cross-examination, was allowed for purpose of impeachment to introduce Appellant's prior criminal record as follows: two indictments involving house-breaking and larceny; four indictments charging the crime of larceny; and four indictments charging arson. It is uncontested that the house-breaking and larceny charges were appropriate. Appellant urges, however, that the court erred in allowing in evidence the four charges involving arson. They involved the burning of three barns and a hut. All of these were relevant on the credibility issue. Offenses involving moral turpitude are permitted but those not involving moral turpitude should be excluded. Whether a particular offense constitutes a crime of moral turpitude has been developed in South Carolina on a case by case basis as a matter of common law. The traditional definition of moral turpitude is:

. . . an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. . . .
State v. Horton, 271 S.C. 413, 248 S.E.2d 263 (1978)

We hold that arson involves an act of baseness, vileness and depravity. Grand larceny is beyond question an offense involving moral turpitude. There is involved the usurpation of another's personal property with intent to commit it to the use of the taker. Arson, like vandalism, is, in many senses of the word, more reprehensible. It involves the destruction of the property of another with not only the intent to deprive the true owner of its use but to also deprive any other person of its use and benefits. We hold that the trial judge correctly admitted the conviction of arson for the limited purpose of impeaching the witness.

Appellant requested by way of discovery an out of court statement made by Willie Wood. The trial court obtained a copy of this statement and advised Appellant's counsel: "I'll give it to you if you need it." The statement contained the same basic facts as testified by Mr. Wood during the trial. The information within the statement is consistent with the indictment and trial testimony. The Appellant was not deprived of information of which he was not already aware and which was actually available to him.

Appellant argues that the lower court erred by failing to direct a verdict for Appellant as to the murder count. We disagree. The evidence must be viewed in light most favorable to the State and any evidence, direct or circumstantial, reasonably tending to prove guilt of the accused, creates a jury issue. State v. Hall, 268 S.C. 390, 395, 234 S.E.2d 219, 221, cert. denied, 434 U.S. 870, 98 S.Ct. 211, 54 L.Ed.2d 147 (1977).

Appellant and Henry Davis planned and jointly executed an armed robbery. The Appellant was armed at the time of the robbery with a pistol which he used to shoot Mr. Wood, from whom money was taken. Appellant drove away only after he (Appellant) thought Davis had been caught. Meanwhile, Davis had stabbed Mrs. Wood to death.

"One who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Woomer, 276 S.C. 278, 277 S.E.2d 696 (1981). State v. Hicks, 257 S.C. 279, 284, 185 S.E.2d 746, 748 (1971). South Carolina adheres to the common law rule of murder and makes no distinction between murder and felony murder. State v. Thompson, 276 S.C. 616, S.E.2d (1982), citing State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1946). The evidence made a jury issue as to the murder charge.

Appellant asserts as error the trial judge's refusal to charge the state's request number 3, concurred in by the Appellant, which set forth a theory of felony murder. As stated above, the state did not proceed on the felony murder theory. The proposed charge was not a correct statement of the law applicable to the present case. The trial judge must determine the law to be charged from the evidence presented. State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). We are of the opinion that the trial judge correctly and precisely determined the applicable law and charged it.

The Appellant requested the trial judge to charge the jury as a mitigating circumstance: "That Dale Robert Yates did not kill the victim Helen Wood." This request was made incident to the penalty phase charge of the bifurcated trial after Appellant had already been convicted of murder. The judge very properly told counsel, in lieu of granting the request, "you may argue it [to the jury] all you wish to." Presumably, counsel did exactly that. The fact that Yates did not do the stabbing personally was one of the facts upon which counsel relied in hopes of obtaining a life sentence. Instead of charging the jury in the language suggested by counsel, the judge submitted a charge which was reduced to writing and taken to the jury room, as required by the code, which reads as follows:

Secondly, the Defendant asks you to consider that the Defendant was an accomplice to the murder, committed by another person, and his participation was relatively minor. In other words, that embraces the theory that the Defendant did not, himself, personally strike the fatal blow.

The charge, first orally and then in writing, to the jury, let it know that it should give consideration to the fact that Yates did not personally stab Mrs. Wood. The thought counsel wished the judge to convey was actually given to the jury, although not in the exact verbagé requested. We find no error.

The next issue submitted to the Court involves the application of a portion of §16-3-20(C) (Cum. Supp. 1981), which reads as follows:

Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment.

After the jury had deliberated for approximately fifty minutes whether the Appellant should receive a life sentence or a death sentence, the foreman reported that the jury was deadlocked. The judge, in a brief statement, said: "... I would not conclude that after the length of time which you have deliberated that you have given due and thorough deliberation to the matter before you, and I am going to ask you to return to the jury room and continue your deliberations." The jury complied and returned

approximately two and one-half hours later with a verdict recommending the death penalty. Appellant contends that the trial judge should have told the jury that if it was not capable of breaking the deadlock, the court would impose a life sentence. This same issue was before this Court and was settled in State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981). The words of the Court are equally applicable here. We said:

The language of the statute provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.

The last questions raised by the Appellant call upon this Court to perform the duty imposed upon it by §16-3-25(C) of our Code. In addition to the traditional alleged errors of law which the Court must rule upon, the statute imposes upon the Court, the duty to

. . . [C]onsider the punishment. . . .

. . . .

(C) With regard to the sentence, the court shall determine:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
- (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in §16-3-20, and
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

It is the contention of the Appellant that this Court should vacate his death sentence because it was influenced by passion, prejudice and arbitrary factors and that the sentence of death was excessive or disproportionate to the penalty imposed in similar cases when both the crime and the defendant are considered. We discussed the duty of the Court under the statutory requirements in the recent case of State v. Copeland, et al., filed November 10, 1982, to which reference is made. While the duty imposed is a difficult one because no two defendants and no two crimes are exactly alike, it is not an unsurmountable chore. Prior to imposition of sentence, the trial judge, who heard the entire case, made this finding:

Mr. Yates, as the trial judge in the case just concluded in which you are indicted for the crime of murder, prior to imposing the death sentence upon you, I find as an affirmative fact beyond any reason-

able doubt that the evidence warrants the imposition of the death penalty and that its imposition is not a result of prejudice, passion, or any other arbitrary factor.

The totality of the record abundantly supports the trial judge's finding. We agree that the evidence warrants the death penalty and our independent finding and conclusion is that the penalty was not the result of prejudice, passion or any other arbitrary factor.

The Appellant emphasizes more particularly his contention that the sentence is disproportionate to penalties imposed in similar cases. He argues that he personally did not stab and cause the death of Mrs. Wood. He testified during the trial that at the time of her death he was not in the store but had departed to the getaway car.

While the case of Enmund v. Florida, ___ U.S. ___, (filed June 29, 1982) had not been decided at the time of the trial, it has been argued orally and we consider it in the light of Appellant's reliance upon it. In Enmund, Sampson and Jeannette Armstrong went to the backdoor of the house of Thomas and Eunice Kersey. Sampson Armstrong grabbed Mr. Kersey, pointed a gun at him and told Jeannette Armstrong to take his money. Sampson Armstrong, and perhaps Jeannette Armstrong, then shot and killed both of the Kerses, dragged them into the kitchen, took their money and fled. Enmund was at that time in a parked car approximately two hundred yards from the house. He was the getaway man. After the Supreme Court of Florida affirmed Enmund's conviction of murder and his death penalty, the Supreme Court of the United States granted certiorari to determine "... whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life nor intended to take life." The gravamen of the holding that Enmund's death penalty was impermissibly excessive under the Eighth Amendment of the United States Constitution is to be found in the following language of the Court:

Here the robbers did commit murder; but they were subjected to the death penalty only because they killed as well as robbed. The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," Lockett v. Ohio, 438 U. S. 586, 605 (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that "causing harm intentionally must be

punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.

Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

The difference between the culpability of Enmund and the culpability of the Appellant is readily apparent. The culpability is different because the degree of participation was different. Enmund expected the Armstrongs to rob the Kerseys, bring the money to the car and that all would depart. On the other hand, Appellant Yates possessed the more potent weapon, a gun, and failed to kill Willie Wood merely because his aim was less than perfect. It is of little significance that the life he intended to take and attempted to take was that of Willie Wood instead of his mother, who was actually stabbed. We have no difficulty in differentiating the case at hand from that of Enmund.

There can be no serious doubt but that the evidence cited hereinabove together with the remainder of the record, amply supports the jury's finding of a statutory aggravating circumstance as enumerated in §16-3-20 of our Code. Section 16-3-20(C)(a) defines one of the aggravating circumstances as follows:

- (1) Murder was committed while in the commission of the following crimes or acts:
 - . . . (e) robbery while armed with a deadly weapon, . . .

This aggravating circumstance was proven by the Appellant's own testimony. There are no offsetting mitigating circumstances of consequence.

In determining whether or not the sentence here imposed is excessive or disproportionate in light of the crime and the defendant, this Court has reviewed the entire record. We have also considered the circumstances of State v. Gilbert, 277 S.C. 53, 238 S.E.2d 179, cert. denied 102 S.Ct. 2258, the only prior holding of this Court suitable for comparison. In that case, the two defendants, Gilbert and Gleaton, spent a morning cruising in search of a target to rob. The same prelude to crime also appears in the

record of State v. Thompson, ___ S.C. ___, 292 S.E.2d 581, cert. denied 102 S.Ct. 1996, rehearing denied 102 S.Ct. 2917. In the instant case, appellant with Davis and Loftis apparently contemplated robbery for over a day, making a diligent search of Greenville County for just the right setting. Indeed, Loftis, one of the accomplices, withdrew from the enterprise before the actual robbery and testified to this lengthy prologue.

As in Gilbert, supra, Appellant and his cohort, Davis, found a solitary, apparently unarmed victim in Mr. Willie Wood. In almost every respect, the robbery unfolded as in the case of Gilbert and Gleaton with one assailant wielding a knife and the other a pistol. Mr. Wood was directed to lean over the store counter by Davis who appeared ready to stab him with the knife. At this point, however, the victim refused to obey. At Davis' command, the Appellant fired two bullets at Wood from close range and fled. From this a jury could conclude beyond a reasonable doubt that Appellant fully intended Wood's death, either by Davis' hand or his own, in the course of this armed robbery.

Hereafter the facts diverge from our previous cases. Mr. Wood did not die from his wound but instead seized his own gun and fought off Davis. Willie Wood's sixty-eight year-old mother then came upon the scene and was stabbed to death by Davis, who in turn was shot and killed by Wood. Although this outcome sets the instant case apart from previous capital sentences we have affirmed, it is sufficient for our purposes that the Appellant displayed the same intent and followed the same pattern of preparation as Gilbert, Gleaton and Thompson before him.

In mitigation, Appellant offered his own testimony and that of his mother. The jury learned that Appellant had been a poor student in school, achieving basically a ninth grade education. In Appellant's own words, he was more interested in "getting out and having fun, shooting pool." If given a life sentence, however, he intended to write a book, study, and improve the prison system. Appellant frankly conceded that he had not managed to do these things during ten previous periods of incarceration. Both Appellant and his mother testified generally that he had some history of drug abuse and that, most importantly, he allowed himself to be influenced by Davis, the deceased accomplice. Appellant did not contend, however, that he was actually inebriated at the time of the robbery nor that Henry Davis forced him to participate.

The trial judge meticulously instructed the jury on the available mitigating circumstances under §16-3-20(C)(b)(1)(4)(5) and (7). In addition, the trial court orally and in writing directed the jury to consider any other mitigating circumstances presented by the defendant.

In our view, the Appellant had the benefit of every reasonable explanation for his acts. We are satisfied that the jury properly found the aggravating circumstance of robbery while armed with a deadly weapon and did so without any influence of passion, prejudice or other arbitrary factor. The testimony in mitigation is comparable to that in State v. Gilbert, supra, if not somewhat less impressive, given the claim of Gilbert and Gleaton that they had partaken of drugs and were acting solely on impulse. We are satisfied that the penalty here imposed is neither excessive nor disproportionate in light of this crime and this defendant. Given that we have upheld a comparable sentence in the comparable case of State v. Gilbert, supra, we are confident that the finding of this jury represents consistent application of the ultimate sanction in this category of capital crime.

As indicated hereinabove, Appellant has filed forty exceptions in quest of a reversal. Many have not been argued and some have admittedly been abandoned. Issues not argued are normally not considered by this Court but in light of the penalty involved, we have considered all exceptions and the entire record to ascertain if there has been committed prejudicial error; we find none. The convictions and sentence of the Appellant, Dale Robert Yates, are, accordingly,

AFFIRMED.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

APPENDIX B

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. *Provided*, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer,

§ 16-3-20

CRIMES AND OFFENSES

solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(b) Mitigating, circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(5) The defendant acted under duress or under the domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age or mentality of the defendant at the time of the crime;

(8) The defendant was provoked by the victim into committing the murder;

(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

OFFENSES AGAINST PERSON**§ 16-3-20**

(D) Notwithstanding the provisions of § 14-7-1020, in cases involving capital punishment any person called as a juror shall be examined by the attorney for the defense.

(E) In every criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused or excluded from service as a juror therein by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict of guilty according to law.

HISTORY: 1977 Act No. 177 § 1; 1978 Act No. 555 § 1, eff June 30, 1978.

APPENDIX C

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

IN THE COURT OF GENERAL SESSIONS

The State,)
)
 -v-)
)
 Dale Robert Yates,)
 Defendant)

NOTICE OF MOTION
 AND
 MOTION FOR THE PRODUCTION AND INSPECTION
 OF EVIDENCE AND INFORMATION WHICH MAY LEAD
 TO EVIDENCE -10

TO: WILLIAM W. WILKINS, JR., THIRTEENTH CIRCUIT SOLICITOR

You will please take notice that as (appointed) legal counsel for the above named, we are requesting, under the authority of Brady v. Maryland, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 364 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); Mooney v. Holohan, 294 U.S. 103 (1935); Giglio v. U.S., 405 U.S. 150 (1972); and, Moore v. Illinois, 408 U.S. 786 (1972), that your office supply to us, or make available for inspection, all evidence which may be favorable to the Defendant with regard to the offense with which he has been charged. The Defendant is requesting access to such favorable information as is in your custody as well as that being held by investigating officers or agencies. Such information would include but would not be confined to the following:

1. Any evidence that the defendant did not by his own actions cause the death of the decedent in this case Helen Wood, including the following:
 - (a) Evidence that the victim died of a stab wound caused by one Henry Davis including photographs and other physical evidence;
 - (b) Evidence that affirmatively shows that the defendant did not cause the death of the deceased Helen Wood including photographs and other physical evidence;
 - (c) Statements by eyewitnesses
 - (d) Statements made by Willie Wood;
2. Any evidence that the defendant acted in this case while under the influence of any intoxicant:
 - (a) Any drugs found on or near the defendant during or after the offense
 - (b) Evidence that the defendant has a history of drug abuse;
 - (c) Evidence that the defendant and the deceased co-defendant, Henry Davis, used drugs together;

(d) Evidence in the form of statements by witnesses that the defendant was under the influence of any intoxicant the day of the killing;

(e) Any evidence that the defendant had no prior history of the use of firearms;

(f) Any evidence that the defendant has no prior history of criminal convictions of offenses against the person - violent crimes;

3. Any and all evidence that the Armed Robbery and the other offenses were part of a plan instigated by the deceased co-defendant Henry Davis and which tend to show that the defendant was a "follower" as opposed to a leader based upon this investigation including:

(a) Evidence to the ownership as to the car used to transport the defendants to the scene of the Armed Robbery;

(b) Evidence of the prior criminal record of Henry Davis;

(c) Evidence of the relative intelligence levels of the defendant and his co-defendant; Henry Davis;

(d) Any evidence from any other witnesses that the defendant was under the influence or dominance of his co-defendant Henry Davis;

(e) Evidence as to who owned the pistol used to wound Willie Wood;

(f) Evidence as to which defendant drove the vehicle to the crime scene;

(g) Physical evidence found inside the vehicle belonging to the co-defendant Henry Davis or members of his family;

(g) Any physical evidence found inside the vehicle belonging to the defendant;

(h) Any evidence of a history of violent crimes on the part of the co-defendant Henry Davis;

4. Evidence that the Armed Robbery, that is the taking of the money, had been completed before any act of physical violence had been initiated by the defendant or his co-defendant, including any evidence of the following:

(a) Evidence that the co-defendant or the defendant had possession of the money taken from the Wood store before any assault and battery had taken place;

(b) Evidence of the sequence of events including the taking of the money, the firing of the shots, and the stabbing of the deceased, Mrs. Wood;

(c) Any evidence that the defendant had attempted to leave the store prior to any violence by either shooting or stabbing;

(d) Any evidence that the victim, Willie Wood, responded to the taking of the money by assaulting the defendant or the co-defendant;

(e) Any evidence that the victim, Helen Wood, responded to the Armed Robbery by assaulting either the defendant or the co-defendant;

(f) Any evidence that the defendant and/or the co-defendant were in the process of leaving the store prior to any act of physical violence, by shooting or stabbing, upon victims in this case;

5. Any evidence that the co-defendant, Henry Davis, on his own initiative was the first to initiate violence upon either Willie Wood or Helen Wood including:

(a) Evidence that Henry Davis assaulted either Willie Wood or Helen Wood before the defendant fired a shot;

(b) Evidence that the assault on Helen Wood occurred after the defendant was either on his way out of the store, or had left the store;

(c) Any evidence that the shooting of the co-defendant, Henry Davis, by the victim, Willie Wood, occurred after the defendant had either left the store, or was on his way out of the store;

6. Any and all evidence which would tend to show that the defendant was under the influence of any intoxicant including the following:

(a) Evidence that the defendant tripped/or fell while running;

(b) Evidence that the defendant jumped out of a moving vehicle;

(c) Evidence that the defendant failed to respond to any request by the police officer to halt;

(d) Any evidence that the defendant failed to respond to any request by a police officer to stop, that police officer having possession of a drawn pistol;

(e) Any evidence that the defendant possessed marijuana or other drugs,

7. Any and all evidence that would tend to show that the defendant fired the gun he was in possession of in response to a direction from his co-defendant Henry Davis;

8. Any and all evidence that the defendant did not fire the pistol he possessed with the intention of killing the victim, Willie Wood;

9. Any and all evidence that the defendant intended to fire at the victim Willie Wood in order to keep Mr. Wood away from his co-defendant, Henry Davis;

10. Any and all evidence which would tend to show that the defendant, Dale Yates, was the furthest away from the victim Willie Wood and the victim Helen Wood at the time of or near the time of the shooting of Willie Wood and the killing of and the stabbing of Helen Wood, including:

(a) Any maps or charts which show the relative position of the parties involved, including the distances;

(b) Any statements by the surviving witness or witnesses which tends to show the relative position of the parties involved;

(c) Any photographs of the Wood's store which tend to show the relative positions of the counters and parties involved;

11. Any and all evidence that the victim in the case, Willie Wood fired shots at either of the co-defendants, including:

(a) The gun or guns fired by the victim Willie Wood;

(b) Number of shots fired by Willie Wood with each gun;

(c) The evidence that the projectiles fired by Willie Wood were recovered by the police;

(d) The positions where the projectiles mentioned in Sub Section (c) were recovered;

(e) Evidence that the projectiles fired by Willie Wood hit the co-defendant Henry Davis;

(f) Evidence that the projectiles fired from the gun by Willie Wood caused the death of co-defendant Henry Davis, including the number of projectiles which actually entered the body of Henry Davis;

(g) Evidence that the projectiles fired from the gun held by Willie Wood ended up in an area near where the defendant stood or had been standing;

12. Evidence that the gun fired by the defendant still held live, unfired rounds, including:

(a) The type of gun held by the defendant;

(b) The number of rounds fired by the defendant;

(c) The number of rounds found by the police in their investigation which had been fired by the defendant;

(d) The position of the rounds discovered by the police which had been fired by the gun fired by the defendant;

(e) The number of live rounds which were found in the pistol believed to have been the pistol fired by the defendant;

(f) The number of rounds which could have been in the pistol believed to have been fired by the defendant;

(g) The result from the report of the South Carolina Law Enforcement Division concerning the match up between the bullets found at the scene and the guns found at the scene, including the gun found in the woods compared to the projectiles found at the scene by the police;

13. Any evidence which tends to show that Mrs. Helen Wood was not in the defendant's presence when the actual Armed Robbery took place;
14. Evidence that the knife found near the body of co-defendant Henry Davis was used in the stabbing death of Helen Wood, including:
 - (a) Any blood matching between that found on the knife and that blood of the victim;
 - (b) Evidence from the investigation which shows the knife belonged to co-defendant Henry Davis,
 - (c) Evidence in the investigation which shows that the knife did not belong to the defendant Dale Robert Yates;
 - (d) Evidence of where the co-defendant carried the knife prior to presenting it to the deceased, Helen Wood;
15. The absence of any evidence tending to show that the defendant and the co-defendant planned to commit any killing in the commission of an Armed Robbery prior to entering the Wood's store;
16. Any and all evidence that the defendant;
 - (a) Has not committed the offense of rape, the offense of assault with intent to ravish, the offense of kidnapping, the offense of burglary, the offense of housebreaking, the offense of killing by poison, or the offense of physical torture while in the commission of a murder;
 - (b) Has no prior record of a conviction for murder;
 - (c) Did not in this case by any act of murder knowingly create a risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
 - (d) Did not commit any offense of murder for himself or for another person with purpose of receiving money or any other thing of monetary value;
 - (e) Did not murder a judicial officer, former judicial officer, solicitor, former solicitor or other officer of the court during or because of the exercise of his or her official duties;
 - (f) Did not cause or direct person to commit murder as an agent or employee of another person;
 - (g) Did not commit the offense of murder against any peace officer, corrections employee, or fireman while that person was engaged in the performance of his or her official duties;
17. Any and all evidence in mitigation as defined by South Carolina Code Section 16-3-20(C) (b), including:
 - (a) Evidence that the defendant has no significant history of prior criminal convictions involved in the use of violence against another person;

(b) Evidence that the murder was committed while the defendant was under the influence of mental or emotional disturbance;

(c) The victim was a participant in the defendant's conduct or consented to the act;

(d) That the defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(e) Defendant acted under duress or under the domination of another person;

(f) The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law were substantially impaired;

(g) The age or the mentality of the defendant at the time of the crime mitigated the murder;

(h) Defendant was provoked by the victim in committing the murder;

Recognizing that Brady v. Maryland, supra, and other authorities cited require that only information favorable to the defendant be made available, and further recognizing that a genuine disagreement may arise as to whether or not a particular item of evidence is favorable, it will be requested that the Court order to provided for an in camera inspection of the items sought to be discovered should you feel that such items are not favorable to the defendant. By permitting the Court to examine the items requested, the legitimate interests of the State will be protected in that no disclosure in excess of Brady, et al., will occur. Further, it will be requested of the Court that said order will be a continuing one, providing that in the event any items sought to be discovered herein become available subsequent to the making of the order pursuant to this motion, said items will be made available to the defendant's attorney forthwith if discovered during trial, or not later than 12:00 noon on the first court day following its acquisition if discovered before trial.

The purpose of said motion is to enable the defendant herein to properly prepare a defense to the offenses charged and to properly prepare for the examination of any witnesses who may testify in this case. Defendant would show that the failure to produce any of the foregoing evidence or information by the law enforcement agency involved would result in a violation of the Fifth, Sixth and Fourteenth Amendments of the Federal Constitution of the United States.

Respectfully submitted,

WILLIAM W. WILKINS, JR.
SOLICITOR, THIRTEENTH JUDICIAL CIRCUIT

SUITE 112
GREENVILLE COUNTY COURTHOUSE
GREENVILLE, SOUTH CAROLINA 29601



TELEPHONE 803-298-8647

April 20, 1981

Mr. John I. Mauldin
710 McBee Avenue
Greenville, South Carolina 29601

Mr. Stephen J. Henry
Office of the Public Defender
Greenville County Courthouse
Greenville, South Carolina 29601

Dear Messrs. Mauldin and Henry:

Please be advised of the following information:

1. Officer P. D. Rice of the Police Service Bureau ran a trace metal test on Defendant Yates' hands. The tests were inconclusive, meaning that the trace metal could not establish or deny that Defendant Yates had recently held a metal object in his hands.
2. Identification Officers of the Police Service Bureau attempted to lift fingerprints from the bag, money, and pistol found in the woods as previously described at the preliminary hearing. No legible or readable fingerprints were lifted.
3. A projectile was recovered from the scene of the crime which the State submits was the projectile which struck Willie Wood in the left hand and left chest. The projectile was compared with the pistol found in the woods, as described at the preliminary hearing, by ballistics experts. The ballistics expert will testify that the pistol could have fired this bullet, but because of deterioration in the inside of the barrel of the pistol, a positive identification cannot be made.

Sincerely,

William W. Wilkins, Jr.
William W. Wilkins, Jr.
Solicitor

WWjr/dj

01331

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLEFebruary 14, 1981

Willie Pralo Wood, do hereby give freely and voluntarily this statement to
Sgt. W.M. Hitchins and
I have identified themselves to me to be Deputies of the Greenville County Sheriff's Office, Greenville, South Carolina. I have been advised that I do not have to make this or any other statement, and that what I say can be used against me in a Court of Law. I have been advised that I have the right to Counsel with an Attorney of my choice, that if I am financially unable to obtain an Attorney the Court will appoint an Attorney to represent me. I have not been threatened or promised any reward to make this statement.

I am 46 years old and I reside at Hwy 253 & 414 Tigerville, S.C.
I have a 12 TH grade education, and I can read and write.

Sometime around 4:00 PM yesterday I was standing behind the check out counter of my store and my mother Helen Wood was in the Post Office part of the store. Two white males came into the store and walked down the aisle towards the drink cooler. A short time later they came walking up to the counter where I was standing. The white male who was wearing the glasses was standing to the right of me on the other side of the cash register and the other white male was standing to the left of me. The white male who was wearing glasses pointed a gun at me and said " give me the money ". And I said what money and the other white male to my left said " give me all the money ". I pulled stacks of twentys out of the cash drawer and gave them to the white male on the left and I also gave him a stack of tens. I ask him if he wanted the ones and change and he said " no". He then told me to lie down across the counter and I told him no because, he had a knife in his hand holding it upward in a stabbing position. I then stepped to my left and the white male on the right with the glasses on shot his gun and I felt something sting my chest. The white male on the left went down the aisle towards the back of the store and came in behind the counter. I then ran towards the front of the store and I heard my mother say something. When we got to the ~~XXXX~~ end of the counter my mother grabbed the guy with the knife and he turned and stabbed her in the chest and she fell to her knees saying " I'am dying". While I was fighting the guy with the knife, I reached for my pistol which was in a holster on my belt and he cut my hand. When I got my pistol out I started shooting him and it was'nt untill the last shot that he fell to the floor. I then



The State of South Carolina

County of GREENVILLE

INDICTMENT FOR

MURDER

At a Court of General Sessions, convened on the 9th day of April,
1981, the Grand Jurors of Greenville County present upon their oath:

That DALE ROBERT YATES and one Henry Davis (now deceased)

did in Greenville County on or about the 13th day of February

1981, did act in concert with each other and in furtherance of their criminal conspiracy did aid, abet, and assist each other in the armed robbery of one Willie Wood at Wood's Grocery Store, Tigerville, South Carolina, and that during the commission of this criminal act, Helen Wood was feloniously, wilfully, and with malice aforethought murdered by means of stabbing with a knife at the hand of Henry Davis (now deceased) on or about the 13th day of February, 1981, and the said Helen Wood did die in Greenville County as a proximate result thereof on or about the 13th day of February, 1981, and that such murder was committed while Dale Robert Yates and Henry Davis (now deceased) were in the commission of robbery while armed with a deadly weapon

Against the peace and dignity of the State, and contrary to the statute in such case and made and provided.

William W. Wilkins, Jr.

Solicitor

WILLIAM W. WILKINS, JR.
SOLICITOR, THIRTEENTH JUDICIAL CIRCUIT



SUITE 112
GREENVILLE COUNTY COURTHOUSE
GREENVILLE, SOUTH CAROLINA 29601

TELEPHONE 803-298-8647

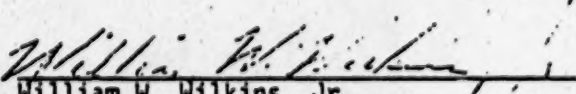
March 31, 1981

NOTICE OF EVIDENCE IN AGGRAVATION

RE: The State v. Dale Robert Yates

TO: Dale Robert Yates, Defendant
Stephen J. Henry, Attorney for Defendant
John I. Mauldin, Attorney for Defendant

PLEASE TAKE NOTICE that either during the trial or during any sentencing proceeding conducted in the above-entitled action to determine whether the defendant, Dale Robert Yates, should be sentenced to death or to life imprisonment, the State will seek to introduce as evidence of aggravation the fact that the murder for which the defendant is charged was committed while the defendant was engaged in the commission of robbery while armed with a deadly weapon and/or larceny with the use of a deadly weapon and all circumstances surrounding the commission of these crimes, and the fact that the defendant has a prior criminal record composed of four (4) separate prior convictions for the crime of arson, six (6) separate prior convictions for the crime of grand larceny, and two (2) separate convictions for the crime of housebreaking.


William W. Wilkins, Jr.
Solicitor



The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

February 24, 1983

John I. Mauldin, Esquire
710 East McBee Avenue
Greenville, South Carolina 29601

Re: The State v. Dale Robert Yates

Dear Mr. Mauldin:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

s/ J. Woodrow Lewis	C.J.
s/ Bruce Littlejohn	A.J.
s/ J. B. Ness	A.J.
s/ George T. Gregory, Jr.	A.J.
s/ David W. Harwell	A.J.

February 24, 1983."

Your Petition for Stay of Remittitur Pending Disposition of Petition for Writ of Certiorari in the United States Supreme Court has been granted in the following order:

"Petition for Stay is granted for a period of sixty (60) days pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court.

s/ J. Woodrow Lewis	C.J.
FOR THE COURT	

February 24, 1983."

Sincerely yours,

Frances H. Smith
CLERK

FHS/cm

cc: The Honorable Harold M. Coombs, Jr.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM
82-6611

NO. _____

DALE ROBERT YATES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Dale Robert Yates, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavit of petitioner in support of this motion is attached hereto along with the Petition for Writ of Certiorari.

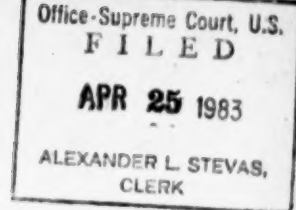
Respectfully submitted,

JOHN I. MAULDIN
STEPHEN J. HENRY

BY: *John I. Mauldin*
710 East McBee Avenue
Greenville, South Carolina 29601

Attorneys for Petitioner.

April 25, 1983.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

NO. _____

DALE ROBERT YATES,

PETITIONER,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF DALE ROBERT YATES

IN SUPPORT OF MOTION TO

PROCEED IN FORMA PAUPERIS

I, Dale Robert Yates, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO

a. If the answer is yes, state the amount of your salary

or wages per month and give the name and address of
your employer. N/A

- b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. JANUARY, 1981

\$3.50/hr.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

- a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or checking or savings account? No

- a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No

- a. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

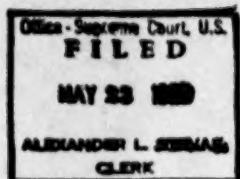
Dale Robert Yates
DALE ROBERT YATES

SWORN to and subscribed before me
this 15 day of April, 1983.

Thomas Ochs (LS)
Notary Public for South Carolina

My Commission Expires: 4/26/89

IN THE
SUPREME COURT OF THE UNITED STATES
October Term



No. 82-6611

DALE ROBERT YATES, Petitioner,
versus,
STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General
of South Carolina

HAROLD M. COOMBS, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES THAT A
TRUE COPY OF Brief in Opposition
HAS BEEN SERVED UPON OPPOSING COUNSEL BY
MAILING 1 COPIES IN AN ENVELOPE PROPERLY
ADDRESSED WITH POSTAGE PREPAID THIS 15th
DAY OF May 1953
Harold M. Coombs, Jr.
ATTORNEY FOR RESPONDENT
SWORN TO BEFORE ME THIS 15th DAY
OF May 1953
Gorey E. Newton
Notary Public for South Carolina
My Commission Expires 9-17-56

QUESTIONS PRESENTED

I.

Did the trial court err in refusing to make Willie Wood's statement available to the Petitioner at trial when said statement was not favorable to the Petitioner, did not create a reasonable doubt as to the Petitioner's guilt, and did not deprive Petitioner of information of which he was not already aware?

II.

Did the trial court err in refusing to charge the State's request to charge number 3 when said proposed charge was not a correct statement of the applicable law since South Carolina adheres to the common law rule of murder and makes no distinction between murder and felony murder?

III.

Did the trial court err during the penalty phase of trial in refusing to charge Petitioner's request to charge number 2 when the substance of the request was actually given to the jury?

INDEX

Table of Authorities -----	111
Opinion Below -----	1
Jurisdiction -----	1
Question Presented I -----	1
Argument I -----	2
Question Presented II -----	3
Argument II -----	4
Question Presented III -----	5
Argument III -----	5
Conclusion -----	7

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Brady v. Maryland</u> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) -----	2,3
<u>James v. State</u> , 143 Ga. App. 696, 240 S.E.2d 149 (1977) -----	3
<u>Lockett v. Ohio</u> , 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) -----	6,7
<u>Odom v. State</u> , 156 Ga. App. 119, 274 S.E.2d 117 (1980) -----	3
<u>State v. Linder</u> , 276 S.C. 304, 278 S.E.2d 335 (1981) -----	6
<u>State v. McDowell</u> , 272 S.C. 203, 249 S.E.2d 916 (1978) -----	6
<u>State v. Nixon</u> , 275 S.C. 575, 274 S.E.2d 406 (1981) -----	2
<u>State v. Penland</u> , 275 S.C. 537, 273 S.E.2d 765 (1981) -----	3
<u>State v. Plath</u> , ____ S.C. ____. 284 S.E.2d 221 (1981) -----	6,7
<u>State v. Yates</u> , South Carolina Supreme Court Opinion No. 21835, filed December 22, 1982 ---	2
<u>United States v. Agurs</u> , 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) -----	2,3

SOUTH CAROLINA STATUTES:

South Carolina Code Section 16-3-20(C)-----	6
South Carolina Code Section 16-3-20(C)(b)(4) ---	5

IN THE
SUPREME COURT OF THE UNITED STATES

October Term

No.

DALE ROBERT YATES, Petitioner,
versus,
STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21835, filed December 22, 1982, as reproduced in Petitioner's Appendix A at pages 1-10.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the trial court err in refusing to make Willie Wood's statement available to the Petitioner at trial when said statement was not favorable to the Petitioner, did not create a reasonable doubt as to the Petitioner's guilt, and did not deprive Petitioner of information of which he was not already aware?

ARGUMENT

I.

The trial court did not err in refusing to make Willie Wood's statement available to the Petitioner at trial.

Willie Wood made a statement to the Greenville County Sheriff's Office dated February 14, 1981. (Petitioner's Appendix E). At trial, the court obtained a copy of the statement and advised Petitioner's counsel that it would be given to him (counsel) "if you need it." (Petition p. 11). In State v. Yates, Opinion No. 21835, filed December 22, 1982, the South Carolina Supreme Court held:

The statement contained the same basic facts as testified by Mr. Wood during the trial. The information within the statement is consistent with indictment and trial testimony. The Appellant was not deprived of information of which he was not already aware and which was actually available to him. (Petitioner's Appendix A-4).

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) creates no rights to discovery. Rather, Brady is concerned with whether or not requested evidence favorable to the accused -- but suppressed by the prosecution -- violates due process where the evidence is material to guilt or punishment. For constitutional error to exist, the requested, non-disclosed favorable evidence must create a reasonable doubt as to the defendant's guilt that did not otherwise exist within the context of the whole record. State v. Mixon, 275 S.C. 575, 274 S.E.2d 406 (1981), citing, United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392,

49 L.Ed.2d 342 (1976). Simply stated, the Brady test is whether the solicitor's failure to reveal requested, favorable information "deprived the defendant of a fair trial." United States v. Agurs, 427 U.S. at 108, cited in, State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981).

Appellant's reliance on James v. State, 143 Ga. App. 696, 240 S.E.2d 149 (1977) is misplaced since that decision is based upon statutory criminal discovery in the State of Georgia. Further, James has since been explained to preclude the necessity for remand, even under the Georgia statutory scheme of discovery, where the appellate court is able to determine that the evidence in question involves only inculpatory statements not impeaching in character. Odom v. State, 156 Ga. App. 119, 274 S.E.2d 117, 118-119 (1980).

In the present case there was no conceivable Brady violation or denial of the Petitioner's rights to due process.

QUESTION PRESENTED

II.

Did the trial court err in refusing to charge the State's request to charge number 3 when said proposed charge was not a correct statement of the applicable law since South Carolina adheres to the common law rule of murder and makes no distinction between murder and felony murder?

ARGUMENT

II.

The trial court did not err in refusing to charge the State's request to charge number 3.

In part, the requested charge states "if the common design was to commit a felony, he is liable [for a homicide committed by a co-defendant] although the homicide resulted collaterally therefrom." (Petition p. 15). Respondent respectfully submits that the finding by the South Carolina Supreme Court on this issue (Petition pp. 15-16) was entirely correct.

Even by Petitioner's own testimony, nothing in the record indicates that the Wood homicide resulted collaterally from the armed robbery. Rather, the record indicates only that the Petitioner's confederate, Davis, stabbed Mrs. Wood to death as he (Davis) attempted to leave the store pursuant to the execution of their (Petitioner's and Henry Davis') common design and purpose to commit an armed robbery. (Petitioner's Appendix A-1, A-2, A-4). The refusal of the State's proposed charge was clearly to the benefit of the Petitioner since the proposed charge would have elevated a hypothetical, arguably accidental killing into murder simply because it occurred in the commission of a felony. The correctness of the ruling by both the trial court and the South Carolina Supreme Court is apparent from the Petitioner's trial counsel's ground for wanting the charge included. "We'd love to have it in your charge

because we think it is absolute error. That would blow this case completely out the bottom. ..." (Tr. p. 1162, lines 18-20). The Petitioner should not now be heard to complain of the trial court's failure to commit a proposed error.

QUESTION PRESENTED

III.

Did the trial court err during the penalty phase of trial in refusing to charge Petitioner's request to charge number 2 when the substance of the request was actually given to the jury?

ARGUMENT

III.

The trial court did not err during the penalty phase of trial in refusing to charge Petitioner's request to charge number 2.

During the penalty phase of trial, the trial judge charged the jury inter alia that in addition to the statutory enumerated mitigating circumstances given to them in writing, they were to consider "any other mitigating circumstances which the Defendant has presented for your consideration." (Tr. p. 1361, lines 18-19; p. 1362, lines 14-18). The trial judge included in the written statutory mitigating circumstances pursuant to South Carolina Code Section 16-3-20(C)(b)(4) "the Defendant was an accomplice to the murder, committed by another person, and his participation was relatively minor." (Tr. p. 1362, lines 4-7). Prior to proceeding to the next statutory aggravating

circumstance the trial judge elaborated, "In other words, that embraces the theory that the Defendant did not, himself, personally strike the fatal blow." (Tr. p. 1362, lines 7-9).

While Appellant argues that it was error for the trial judge to fail to charge orally and in writing his request to charge number 2, an examination of the record and law completely refutes this contention. Defendant's request to charge number 2 reads "That Dale Robert Yates did not kill the victim, Helen Wood." (Tr. p. 1808).

While a jury must be told that they may consider any mitigating circumstances, "this does not require that they be given to the jury in writing as is required for the statutory mitigating circumstances." State v. Linder, 276 S.C. 304, 278 S.E.2d 335, 339 (1981), citing, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); South Carolina Code Section 16-3-20(C) (Cum. Supp. 1981). The trial testimony from both the State and the Appellant was that the Appellant did not personally strike the blow which killed Mrs. Wood. Where non-statutory evidence in mitigation is already before the jury, failure to give a specific oral instruction as to that evidence is not necessarily prejudicial and reversible error. State v. Plath, ___ S.C. ___, 284 S.E.2d 221, 230 (1981). Moreover, where the charge given adequately covers the substance of the request to charge, the trial judge may properly refuse the requested charge. State v. McDowell, 272 S.C. 203, 249

S.E.2d 916 (1978), cited in. Plath, supra. In the present case, the trial judge's charge clearly covered the substance of the requested charge, as held by the South Carolina Supreme Court (Petitioner's Appendix A-5), and complied with the mandate of the Court in Lockett v. Ohio, supra, and the law in South Carolina.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General
of South Carolina

HAROLD M. COOMBS, JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT.